



San Joaquin River Group

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SENT VIA ELECTRONIC TRANSMISSION

September 30, 2011

Delta Stewardship Council
980 Ninth Street Suite 1500
Sacramento, California 95814
DeltaPlanComment@deltacouncil.ca.gov

Re: Fifth Draft Delta Plan

Dear Council Members:

The San Joaquin River Group Authority (“SJRG”) has reviewed the fifth draft of the Delta Plan (the “Fifth Draft”) released for public comment on August 2, 2011. After review, our comments on the Fifth Draft remain much the same as comments we previously submitted. The Fifth Draft persists in over-emphasizing the regulation of water flow and taking an expansive and unsupported view of the authority of the Delta Plan. The SJRG’s initial concerns persist; we continue to feel the approach in the Fifth Draft is ineffective, not legally defensible, and overall lacking in identification of viable solutions to move forward.

Flow Regulation

Like previous versions, the Fifth Draft relies heavily on proposed policy (ER P1) (“Flow Policy”) which requires the State Water Resources Control Board (“State Board”) to adopt and implement flow objectives by 2014. The Fifth Draft’s use of the Flow Policy is problematic for several reasons:

The Flow Policy Mischaracterizes the Process to Review Flow Objectives

The Flow Policy directs the State Board set “new and updated” flow requirements. The State Board has already set water quality objectives—they are in place and being met. Therefore, the State Board is not setting new flow requirements—but reviewing the existing water quality objectives to determine whether they are sufficient to reasonably protect the identified beneficial uses, considering all public trust uses.

The Flow Policy is Pre-Decisional and Marginalizes the Process to Review Flow Objectives

The Flow Policy incorrectly assumes the State Board will determine that (1) water quality objectives need to be amended and (2) this amendment will require a regime of increased flows. The State Board has not completed its environmental review of the water quality objectives and may determine the objectives do not need to be amended. Further, the State Board has not yet determined how it plans to implement any objectives it amends. Although, historically, the State Board used flow as a means of protection, the State Board is not limited to or otherwise required to use flow and could conclude reasonable protection of fish and wildlife is best achieved through non-flow related measures not examined in the Fifth Draft, such as reducing predation or establishing discharge control programs.

The Flow Policy Goes Beyond the Authority of the Council

The Flow Policy amounts to the Council regulating in place of the State Board. By mandating the State Board set new flow standards, the Council attempts to perform the regulatory duties assigned to the State Board. This amounts to a super regulatory act, which is outside the authority of the Council. Furthermore, should the State Board not update flow objectives by 2014, the Council may recommend the State Board cease issuing water rights permits in the Delta and Delta watershed. Again, this amounts to the Council exercising power outside of its jurisdiction; the Council should not be attempting to act on behalf or in place of the State Board.

The Flow Policy is Unrealistic

The Flow Policy requires the State Board adopt and implement new water quality objectives by 2014. The review and potential amendment of water quality objectives is a complex process in which science, public trust, and policy must all be analyzed and balanced. Implementation of flow objectives is equally, if not more, complex, often involving quasi-judicial proceedings. Due to the complexity of these processes, amended flow objectives cannot be adopted and implemented by 2014.¹

The Flow Policy is Overused

The Fifth Draft includes the Flow Policy as a proposed regulation in three of five substantive chapters, relying on it to ensure water reliability, restore the Delta ecosystem, and improve water quality. Such reliance on the Flow Policy is misplaced for at least two reasons. First, the Fifth Draft fails to adequately and logically explain how and the extent to which increasing flow will protect fish and wildlife beneficial uses. Second, the Council's reliance on the Flow Policy

¹At present, the State Board is still in the early stages of reviewing water quality objectives for flow in the San Joaquin River and has not yet begun reviewing objectives for the Sacramento River or for Delta outflow. The complexities of the process which make the flow policy unrealistic include, but are not limited to, issues involving licensing by the Federal Energy Regulatory Commission ("FERC") to meet whatever new or amended water quality objectives for flow the State Board eventually develops. New conditions can only be attached to FERC licenses upon renewal which may occur after the 2014. For instance, the New Don Pedro project is not due for renewal until 2016, thereby rendering it impossible to meet the 2014 deadline.

compromises other non-flow solutions. For instance, the chapter on ecosystem restoration relies on the flow policy, while failing to address issues that more directly impact habitat, such as predation, food web, temperature, contaminant issues, and dredging.

Return to a Natural Hydrograph

The Plan promotes an infrastructure that “mimics a more natural hydrograph.” The Plan itself acknowledges that returning to a historical ecosystem is not possible, yet proposes that a “natural” flow regime will provide benefit in such an unnatural system. This is not realistic or defensible. Science simply does not support the idea that returning one component to its “natural” condition, while ignoring the other multitudes of change, will benefit the existing unnatural environment or otherwise restore the ecosystem.

Covered Actions

The Fifth Draft continues to use expansive and ambiguous language when describing the Council’s authority over covered actions. As evidenced by the September 15, 2011 workshop on covered actions, the language in the Fifth Draft remains confusing, overreaching, and does not provide stakeholders sufficient guidance to determine whether a project is a covered action. The statutory language on covered actions clearly limits jurisdiction to actions that “occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.” The Fifth Draft’s expansive and unsupported interpretation unwinds the geographic limitation and would allow the Council to review actions well beyond the Delta. Such an interpretation is unlawful and must be revised to be consistent with the Delta Reform Act.

Geographic Scope

The Fifth Draft continues to reach beyond the scope allowed for by the Delta Reform Act by attempting to regulate “areas that divert water upstream of the Delta and areas that receive export water from the Delta.” This goes beyond the express authority provided by the Delta Reform Act, which focuses on actions that occur in the Delta and Suisun Marsh, and must be revised.

The San Joaquin River Group Authority urges the Council to address and remedy these problems before the draft environmental impact report is released.

Sincerely,



ALLEN SHORT, Coordinator
SAN JOAQUIN RIVER GROUP AUTHORITY

cc: SJRGA